

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1077

To be argued by
DAVID A. CUTNER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1077

UNITED STATES OF AMERICA,

Appellee,

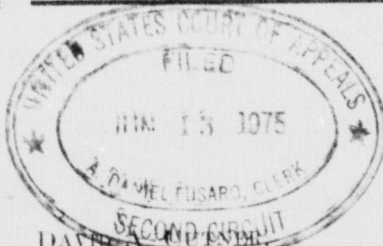
—v.—

WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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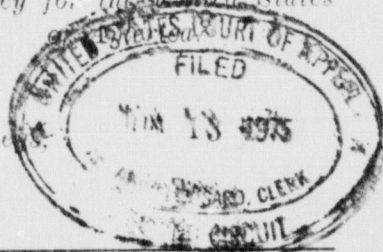




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UNITED STATES OF AMERICA,

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—v.—

WILSON TORRES,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Wilson Torres appeals from a judgment of conviction entered on March 11, 1975, in the United States District Court for the Southern District of New York, following a two-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 72 Cr. 391 was filed on April 7, 1972 in two counts. Count One charged Wilson Torres, Jose Sanjurjo, Jesus Sanjurjo, and Hector Ortiz with conspiring to distribute narcotics, in violation of Section 846 of Title 21, United States Code. Torres was not named in Count Two.

In a prior trial on this indictment in March of 1974, the jury returned a verdict of guilty on Count One, and Torres was sentenced to imprisonment for one year.* The judgment of conviction was reversed, however, and remanded for a new trial.** *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974) (Oakes, C.J., and Frankel and Kelleher, D.JJ.).

The trial from which Torres now appeals commenced on March 10, 1975 and concluded on March 11, 1975, when the jury returned a verdict of guilty on Count One. Immediately thereafter, Judge Wyatt re-sentenced Torres to imprisonment for one year. Torres is presently serving that sentence.

Statement of Facts

The Government's Case

Jose Guzman, a New York City Police Detective, testified that on January 11, 1972, in an undercover capacity, he made a telephone call to Jose Sanjurjo, and told him that he was interested in purchasing some heroin. Sanjurjo agreed to meet Guzman at 121st Street and Second Avenue at 7:00 p.m. that same day. Guzman met Sanjurjo at the appointed place, and Sanjurjo told him that he could purchase an ounce of heroin for \$1,000 (Tr. 33-34).

The sale of an ounce of heroin to Guzman was subsequently scheduled for January 18, 1972. Sanjurjo told

* Jesus Sanjurjo was convicted on Count One at yet an earlier trial in September of 1972 and was sentenced on October 27, 1972 to six months imprisonment; Jose Sanjurjo, Ortiz, and Torres were fugitives at the time of that trial. Jose Sanjurjo entered a plea of guilty on Count One on March 21, 1974, and on May 17, 1974, was sentenced to eighteen months imprisonment. Hector Ortiz entered a plea of guilty on both counts on March 25, 1974, and on May 17, 1974, was sentenced to imprisonment for one year.

** The Government's Petition for Rehearing with a Suggestion for Rehearing In Banc was denied on December 30, 1974.

Guzman to meet him in front of a "club" at 2353 Second Avenue, near 121st Street. When Guzman arrived to make the purchase, he was met by Hector Ortiz. After some preliminary conversation with Ortiz, Guzman met Sanjurjo and Ortiz on the sidewalk in front of the club, and Ortiz gave Guzman a package. Guzman told Ortiz and Sanjurjo that he did not want to count money on the street, so Guzman and Ortiz went into the hallway at 2353 Second Avenue, where Guzman paid Ortiz \$1,900 (Tr. 34-36).

On February 14, 1972, Guzman returned to 121st Street and Second Avenue, where he spotted Ortiz coming out of the club. Ortiz asked Guzman if he wanted to purchase any heroin that night and Guzman replied that he would purchase one-eighth of a kilogram of heroin but that he wanted to talk to Jose Sanjurjo first. Ortiz said that Jose Sanjurjo had gone to Puerto Rico, but that Sanjurjo had left a close relative in charge of the business and that Guzman should come back later that night (Tr. 38-40).

Guzman returned later that night, and Ortiz got into his car. Jesus Sanjurjo approached the car and told Guzman that the one-eighth kilogram of heroin would cost \$3,600. Guzman replied that he would purchase the "eighth," but that he wanted to speak with Jose Sanjurjo first. Jesus Sanjurjo then got into a white car and drove off. He returned shortly and reported that Jose Sanjurjo said that if Guzman wanted to purchase the heroin he would have to deal with Jesus Sanjurjo. Guzman insisted on seeing Jose Sanjurjo, and a brief argument ensued. Jesus Sanjurjo drove off again and then returned to say that Jose Sanjurjo was waiting around the corner on 120th Street (Tr. 40-42).

Guzman walked down Second Avenue to 120th Street and, when he turned the corner, he saw the white car that Jesus Sanjurjo had been driving. Jose Sanjurjo was standing on the sidewalk next to the white car, and Wilson

Torres was seated in it. When Guzman approached Jose Sanjurjo, Sanjurjo said that he would sell Guzman the one-eighth kilogram of heroin, but that in the future Guzman would have to deal with Jesus Sanjurjo. Guzman returned to his car and was met by Ortiz and his wife, Lillian. Ortiz stated that Guzman should drive with Lillian to 100th Street and First Avenue (Tr. 42-43).

Guzman drove to 100th Street and First Avenue, followed by the white car. When Guzman parked, Torres emerged from the white car and got into the back seat of Guzman's car and told Guzman to drive back to 120th Street and First Avenue, where Torres said Guzman would get the heroin. Guzman expressed annoyance at all of the driving around. Lillian Ortiz or Torres said that their "connection" had to take care of himself because the deal involved a large quantity of heroin, and that Jesus Sanjurjo would be following them in the white car to make sure that Guzman was not being followed by the police (Tr. 43-45, 91).

At 120th Street and First Avenue, Lillian Ortiz and Torres got out of Guzman's car and said they would be back shortly. Lillian Ortiz returned a short time later and, after a conversation with Guzman, the two of them drove to 96th Street and Second Avenue. Torres and others followed in the white car. After Guzman parked at 96th Street, Torres again appeared and said that he was going to bring the heroin. Then Torres and Lillian left Guzman's car. Guzman waited for a short time, but nobody brought the heroin. While Guzman waited, uniformed police appeared on the scene on two separate occasions because of an accident and a stalled car (Tr. 45-47, 93-94).

On February 22, 1972, Guzman went again to 121st Street and Second Avenue. He pulled up parallel to the white car in front of 2353 Second Avenue. Seated in the

white car were Jesus Sanjurjo and Torres. Sanjurjo got out of the car, negotiated with Guzman for the purchase of one ounce of heroin, and told Guzman to return that evening. Guzman did so, but nobody appeared to meet him (Tr. 47-48).

Surveillance agents John Miller and Lawrence McDonald corroborated Guzman as to the dates, times, and places of Guzman's meetings with the defendants (Tr. 83-95, 107-116). Miller also testified that Torres was arrested on February 24, 1972 and brought before a United States Magistrate. Shortly thereafter, Torres made bail, and signed an appearance bond. When the indictment was filed, however, Torres failed to appear and a bench warrant issued for his arrest. Miller and Police Officer Calvin Holmes testified to their attempts to locate Torres during the period of September, 1972 to January, 1974, when Torres was finally apprehended in Puerto Rico (Tr. 96-99, 124-126).

The Defense Case

Wilson Torres offered no evidence.

ARGUMENT

POINT I

Defense counsel opened the door to proof of Guzman's prior consistent statements on redirect examination.

Torres asserts that his conviction should, for a second time, be reversed because the Government elicited on redirect examination of the undercover agent, Jose Guzman, a prior consistent statement, namely, Guzman's testimony at Torres' first trial as to a particular conversation he had

with Torres.* This assertion is incorrect. Proof of the prior consistent statement became perfectly proper and necessary to correct inaccurate testimony which defense counsel elicited on cross-examination through the use of compound questions which contained misstatements of fact.

On cross-examination, defense counsel established (1) that Guzman failed to mention the conversation in his "BND Form 6, Report of Investigation" (Tr. 62), (2) that Guzman failed to mention the conversation in his testimony at the Jesus Sanjurjo trial in 1972 (Tr. 64), and (3) that Guzman testified "in an earlier proceeding a short while ago in this same case" concerning the same report and the same narcotics transaction (Tr. 61-63). Against this background, defense counsel then asked the following questions, which are nowhere mentioned in his skillfully written brief:

"Q. Now, Mr. Guzman, later in 1972, you gave testimony, did you not, against somebody else involved in this case, is that correct? A. Yes, sir.

Q. And do you recall in that testimony the fact that *you again did not refer to this conversation which you have only testified about today?* A. Yes, sir.

Q. You left it out then also? A. Yes, sir.

* The substance of this conversation was that, while Torres and Lillian Ortiz were riding in Guzman's car, Guzman complained that he did not like all of the driving around and Lillian or Torres replied that the connection had to be careful because the transaction involved a large quantity of heroin. Torres magnifies this single conversation as if to suggest that the Government's entire case rested on it. In fact, the proof wholly apart from this conversation overwhelmingly established that Torres "was willingly taking a leading role in the attempted completion of the February 14 transaction." *United States v. Torres, supra*, 503 F.2d at 1124.

Q. By the way, before you came here to testify today, I take it you read and examined this report of yours, didn't you? A. Yes, sir.

Q. You studied it in preparation for your testimony? A. Yes, sir.

Q. And you also studied the prior testimony you gave on other occasions, did you not? A. Yes, sir.

Q. And you discussed your past testimony and your present testimony here with Mr. Cutner, didn't you? A. Yes, sir.

Q. And you discussed it in the past, have you not, with other Assistant United States Attorneys? A. Yes, sir.

Q. And one of the things you discussed with Mr. Cutner was the problem about things that you omitted in your past reports and testimony, isn't it? A. Yes, sir.

Q. And that you would be confronted with the fact that *you had failed to include things in your report that you now for the first time say happened*; is that right? A. I wouldn't say—I would have to say yes and no to that.

Q. But that was something that was discussed? A. Yes, sir.

Q. And another thing that Mr. Cutner prepared you for was the fact that you were to be questioned on the fact that when you testified under oath against someone else involved in this case you didn't mention certain conversations which you now say happened; is that correct? A. Yes, sir" (Tr. 64-65; emphasis supplied).

Following this cross-examination, the Government on re-direct proved Guzman's testimony at Torres' first trial a year earlier to rebut the false implication created on cross-examination that Guzman "only testified about [this con-

versation] today" and that he failed to report on things which he "now for the first time say[s] happened.*

Torres maintains that proof of Guzman's prior consistent testimony was "rank hearsay" and "plainly improper" (Brief at 7), relying principally on *United States v. Sherman*, 171 F.2d 619 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949). To the contrary, the prior consistent statement was not improper hearsay; rather, it was prior sworn testimony subject to cross-examination offered to correct inaccurate testimony elicited by defense counsel through the use of compound questions which contained misstatements of fact. Thus, *United States v. Sherman, supra*, and the other "prior consistent statement" cases cited by Torres (Brief at 8-9) are clearly inapplicable.

First, proof of Guzman's prior testimony on redirect was offered not to bolster his direct examination, but rather to correct the misimpression created by inaccurate testimony twice elicited by defense counsel on cross-examination through repeated and gratuitous factual misstatements within questions:

"Q. And do you recall in that testimony the fact that you again did not refer to this conversation *which you have only testified about today?*

A. Yes, sir.

* * * * *

* Defense counsel also objects to "the matter in which the prosecutor offered this prior consistent testimony" (Brief at 10), claiming that the prosecutor misled the jury into believing that the cross-examination of Guzman had embraced Guzman's testimony at Torres' first trial. In view of defense counsel's questions which incorrectly assumed that Guzman was testifying "now for the first time" to the conversation, we submit that the Assistant's preliminary question was proper. In any event, the possibility of any prejudice was clearly eliminated by defense counsel's speaking objection and by the Court's ruling on the objection (Tr. 74).

Q. And [you were advised] that you would be confronted with the fact that you had failed to include things in your report *that you now for the first time say happened*; is that right? A. I wouldn't say—I would have to say yes and no to that."

Accordingly, the rule in *Sherman* limiting admission of prior consistent statements is not controlling or even relevant here. *United States v. Fayette*, 388 F.2d 728, 733-35 (2d Cir. 1968).

This case is governed by the longstanding rule that redirect examination is proper:

"to meet what has been brought out in the meantime upon the cross-examination, namely, facts made *relevant to overthrow the opponent's facts* adduced in support of his own case . . . , and facts *explaining away discrediting facts* or other weakening facts affecting the proponent's own case and brought out on cross-examination." VI Wigmore on Evidence § 1896, p. 567 (3d ed. 1940) (emphasis in original).

Thus, once a party has "opened up" a topic to examination—here, whether Guzman was testifying to the conversation "now for the first time"—the other side must have an opportunity to probe into it, *United States v. Lewis*, 447 F.2d 134, 140 (2d Cir. 1971), and to dispel any inference not warranted by the facts, *United States v. Fayette*, *supra*, 388 F.2d at 733-35. The scope of the examination is within the discretion of the trial court, *United States v. Dardi*, 330 F.2d 316, 333 (2d Cir. 1964), *cert. denied*, 379 U.S. 845 (1965); *United States v. Minuse*, 142 F.2d 388, 389 (2d Cir.), *cert. denied*, 323 U.S. 716 (1944), as is the admission of a prior consistent statement to rebut a defense charge of recent fabrication, *United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972); *United States v. Fayette*, *supra*. Since defense counsel first brought out that Guzman had testified at an earlier trial of Torres,

the misleading way in which he put his questions concerning the conversation "which you have only testified about today" put before the jury the false implication—most harmful to the Government's case—that Guzman had thought the conversation up since Torres' last trial "a short while ago" (Tr. 62). The Government was entitled to rebut this wholly inaccurate implication as it did. *United States v. Fayette*, *supra*; cf. *United States v. Rivera*, Dkt. No. 74-2115 (2d Cir., March 13, 1975), slip op. at 2277-2278.

United States v. Sherman, *supra*, relied upon by Torres, is inapplicable for another reason as well. In *Sherman* the Court stated:

"[M]ost persons would probably consider any earlier consistent account, in some measure at least, confirmatory of a witness' testimony. *The reason for its exclusion is because it has not been made under oath* rather than because it has no probative value, although courts have often spoken as though it had none." 171 F.2d at 622; emphasis supplied.

In contrast to the out-of-court, hearsay statement proved in the *Sherman* case, the proof here was of prior testimony, under oath and subject to cross-examination, by Guzman, who took the stand at this trial as well. See Rule 801(d)(1) of the Federal Rules of Evidence. Accordingly, for this reason also, the *Sherman* case is simply not relevant.*

* It is worth noting that, in any event, there have been a number of cases in the Second Circuit since *Sherman* which have distinguished it and commented on the trend toward liberalization of its apparent holding. Generally speaking, the trend has been to allow the trial judge broad discretion in allowing prior consistent statements to rehabilitate a witness impeached by a prior inconsistent statement even when the statements do not strictly fall into the recognized exceptions for statements antedating an asserted motive to falsify. *Applebaum v. American Export Isbrandtsen Lines*, 472 F.2d 56, 60-62 (2d Cir. 1972); *United States v. Zito*, *supra*, 467 F.2d at 1403-1404; *United States v. Fayette*, *supra*, 388 F.2d at 733, fn. 1.

POINT II

The jury was not misled in any way regarding Guzman's testimony.

Torres asserts that another portion of the re-direct examination of Guzman, to which he did not object below, requires reversal for the reason that the jury was misled about Guzman's testimony at the trial of Jesus Sanjurjo in 1972.* Once again, Torres has pieced together an argument omitting relevant portions of the testimony and summations which are not helpful to his position. When the record is fully examined, it is readily apparent that there is no possibility whatever that anyone was misled. In

* This contention involves the conversation between Guzman, Torres and Lillian as they drove from 100th Street to 120th Street on February 14. At the trial below, Guzman testified, as he had at Torres' first trial, that during this drive the following conversation occurred:

"And as I was driving to 120th Street and 1st Avenue, I was told either by Wilson Torres or Lillian that the connection had to be careful because it was a [(sic) no] small package, it was an eighth of a kilo, and they wanted to make sure that nothing would happen, and that Jesus Sanjurjo would be following me in the white car.

"I then told them that that is not the way that I do business, driving from one place to the other, and that that way, myself and my car get hot, and I could be either taken off or arrested by the police.

"As we arrived at 120th and 1st Avenue, Lillian and Wilson Torres left the car and stated that they'd be back shortly" (Tr. 44-45).

Guzman testified at the Jesus Sanjurjo trial in 1972 that:

"Once I parked on 100th Street and 1st Avenue, I was approached by Wilson Torres, who then instructed me to drive to 120th Street and 1st Avenue. While I was driving, Lillian told me that the connection had to be careful that I wasn't being followed. As we arrived at 120th Street and 1st Avenue, Lillian and Wilson Torres left my car and proceeded east on 120th Street" (*Sanjurjo* Tr. 72).

addition, the testimony obviously did not strike experienced defense counsel as misleading and improper, since he failed to object * or even to offer the transcript of Guzman's testimony at the Jesus Sanjurjo trial.**

The full record on this subject is as follows.

CROSS-EXAMINATION BY MR. NAFTALIS:

Q. Now, Mr. Guzman, later in 1972, you gave testimony, did you not, against somebody else involved in this case, is that correct? A. Yes, sir.

Q. And do you recall in that testimony the fact that you again did not refer to this conversation which you have only testified about today? A. Yes, sir.

Q. You left it out then also? A. Yes, sir (Tr. 64).

RE-DIRECT EXAMINATION BY MR. CUTNER:

Q. Now, you were asked about your testimony in a prior proceeding in 1972, September of 1972. Can you tell us who the defendant was in that case? A. Yes, a male known to me and [(sic) as] Jesus Sanjurjo.

Q. In the trial in which you testified where the defendant on trial was Jesus Sanjurjo, were you asked for your conversations with Wilson Torres? A. No, sir.

Q. But it's true, isn't it, that you did testify about at least a part of your conversations with Wilson Torres? A. Yes, sir.

* The failure to object below is sufficient to foreclose the argument now made even if it were meritorious, which, we respectfully submit, it is not. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

** One of Torres' points on appeal from his conviction in the first trial was that the Court had improperly excluded this transcript, which Torres had offered to show that Guzman's testimony allegedly was the same in both trials except for the conversation in the car among Guzman, Torres, and Lillian. Having won the right to put in this transcript, 503 F.2d at 1127. Torres did not even bother to do so in the retrial.

Q. As a matter of fact, didn't you testify as follows, Mr. Guzman: This is at page 10.

* * * * *

"Q. Tell us what you did. A. Once I parked on 100th Street and 1st Avenue, I was approached by Wilson Torres, who then instructed me to drive to 120th Street and 1st Avenue. While I was driving, Lillian told me that the connection had to be careful, that I wasn't being followed. As we arrived at 120th Street and 1st Avenue, Lillian and Wilson Torres left my car and proceeded east on 120th Street."

Was that your testimony in the trial against Jesus Sanjurjo? A. Yes, it was, yes, sir.

Q. And continuing on page 11—no, I withdraw that (Tr. 70-72).

RECROSS-EXAMINATION BY MR. NAFTALIS:

Q. I want to go back to what I was questioning about in 1972, sir; where you brought out certain conversations were not included in your prior sworn testimony against Jesus Sanjurjo, is that right? A. Yes, sir.

Q. Mr. Cutner read from page 10 and started to read on page 11 but dropped it. I'd like to finish the part he dropped. "A. Subsequently Lillian returned to the car and stated that I would get a package at 96th Street and 2nd Avenue. While I was driving down to 96th Street and 2nd Avenue I again observed the white car following my car, and while I was driving Lillian stated that Jesus Sanjurjo had to be careful because it was a large amount. When I got to 96th Street and 2nd Avenue, I parked the car and waited there for a few minutes. Subsequently, Wilson Torres approached the car and told me that the package would be delivered in a few minutes."

Q. That was your testimony in '72, is that correct? A. Yes, sir.

Q. And Lillian was the one who according to your testimony when you first testified under oath about all these

matters, was the one you said who you had these conversations with, is that correct? A. Yes, she also mentioned this, yes, sir.

Q. No mention of Wilson Torres, although you recounted all the events of that evening, is that correct? A. Yes, sir (Tr. 77-78).

DEFENSE SUMMATION:

Mr. Guzman also told you that he claimed he had a couple of other conversations during those action-packed two minutes with Wilson Torres; one of which is when Mr. Guzman claims he said, "Oh, gee, I don't like to do business this way, I'm afraid I am going to get burned," or something to that effect; a conversation which is absent from Mr. Guzman's report, and absent from his sworn testimony under oath in 1972. And also he said that there was a conversation with either Lillian Ortiz or Mr. Torres in which Mr. Torres said—excuse me, the conversation with Lillian Ortiz, the lady who is surprisingly not a defendant in this case and Mr. Torres, in which one of them said that they had to protect the connection, or words to that effect. Of course that conversation is not in the report, it's not in his sworn testimony when he was told to recount the events under oath in a criminal trial in this courthouse in 1972. In those days he said it was Lillian who had this alleged conversation but now his memory has gotten a little bit better. He's thought a little bit more about Mr. Torres. After all, Mr. Torres is on trial now.

* * * * *

So even if you believe Guzman's testimony, the government's only witness, the government's case falls flat on its face, but I suggest to you that you may find, in your evaluation of the evidence, that Guzman's testimony is hardly worth accepting at face value. Mr. Cutner apologizes for Mr. Guzman's past record of giving false and inconsistent testimony by saying, "Well, he is just human."

He might be human to make a mistake; it might be human to lie, but it's not right. The evidence shows in this case that Mr. Guzman has changed his testimony to fit the circumstances, he's told conflicting stories about the same events, and that's very relevant to you in determining whether or not someone is believable or not. Use your common sense. You people deal with people throughout your everyday lives. You have to make judgments about whether a man is honest or dishonest. If a man comes in and tells you a story one day one way, a second way the second day, a third way the third day, and a fourth way the fourth day, maybe by the first or second or maybe the third or fourth day you find you are not really going to believe this man. Maybe this man doesn't tell the truth because he changes his story to fit his moods.

And that is all you do here in the jury room. You use your common sense, and make judgments about things. That's why jurors are picked. They are not supposed to use any fancy rules. You are supposed to use your judgment, your experience, your common sense, how you look at people, whether they make sense to you.

Now, let's talk a little bit about Mr. Guzman's record. First, on cross-examination, we were able to establish that two days after the events of February 14, 1972, that is on February 16, 1972, Mr. Guzman made a detailed report of the events of the night in question. This report was made at the time when obviously Mr. Guzman remembered the facts quite a bit better. I think it's fair to say that on February 16, 1972, most people remember things that happened two days before a little bit better than in March 1975.

This is a detailed report. You might want to take this with you to the jury room. It's three pages long, single spaced, typed. It recounts every event and conversation that allegedly or supposedly occurred on the night in question.

Now, it makes no mention of these two new conversations, that only saw the light of day last year when Mr. Guzman was testifying in a prior proceeding involving this case, that Guzman now claims took place.

One, the conversation that he was afraid of getting burned, and secondly, well, that either Wilson Torres or Lillian said that the connection had to be protected.

In the report the getting burned conversation isn't there, because it didn't happen, and in the report, the statement about the connection having to be protected, Lillian, who isn't indicted for whatever reasons the government chose, says it, and Wilson Torres is not on the scene, he is not there.

And another interesting thing about Agent Guzman, you might consider this, that in a prior proceeding in this case, when he was asked about this, he was sworn to tell the truth under oath, he was asked, "Isn't it a fact, sir, that in your report you pointed out that this conversation about which you have just testified involving connections only took place with Lillian and Mr. Torres was not present, isn't that a fact?" Answer: "No."

Of course looking at the report, it shows that is a lie and he conceded on the stand that was a lie.

So Mr. Innocent Mistake, Guzman, gave false sworn testimony under oath in a prior proceeding in this case in 1974 about a very material fact and that is what used to be called perjury and I guess it's still called perjury except I don't suspect Mr. Guzman is going to be prosecuted for it.

And Judge Wyatt will charge you that if someone gives false testimony about a material fact in this case, you are entitled to throw out his whole testimony. You are entitled to throw out Guzman's whole testimony if you

believe he's testified falsely. You can reject the whole thing lock, stock and barrel.

And there it is, undisputed, he gave false testimony under oath last year. It's in the record, you can hear that read back to you; about what was in his report which he's admitted he studied; he studied his testimony because he knew he was going to be questioned about the fact that he wasn't going to be saying the same things that his prior testimony had said.

Back in September '72 as I pointed out, Mr. Guzman goes in and he testifies as a witness in a trial. He swears to tell the truth. He takes an oath just like the same one everybody took here, he testifies against a man named Jesus Sanjurjo who is on trial, one of the people allegedly here. He testified that he was asked about the events in question the night of February 14th, and the events in question, it's pretty clear from the record, are the same, no matter who's on trial. Right? No matter what happened, happened, if anything happened.

And there he leaves out these conversations. He testifies to other things but these two are left out. Think about that. That was sworn testimony under oath. He was obliged to tell the truth.

That is a criminal case. Yet he doesn't testify about these two conversations that he now claims—he claimed last year that he had with Mr. Torres. Mr. Cutner, trying to rehabilitate him, said well—he tried to confuse you, pull a little wool over your eyes, on redirect, when he read from the pre-trial proceedings here in 1974, Mr. Guzman's testimony, which of course had absolutely nothing to do with the testimony he gave in '72 and his false report.

Now, there is even more about Mr. Guzman. Guzman swore here on the witness stand before your very eyes in response to a question on cross-examination he testified in

a Grand Jury. That is a pretty significant event, coming to testify in a Grand Jury. "Yes, I testified in the Grand Jury in this case." And that too was not quite the truth. Mr. Cutner when asked about that was forced to concede that Mr. Guzman never testified in the Grand Jury about this case. Now, you have Guzman testified he did. Another little thing by Mr. Guzman, except that it isn't so little, it's just part of a pattern.

Now, ladies and gentlemen, it gives me no pleasure to use this podium as any sort of slaughterhouse of somebody's reputation. It gives me no pleasure to point out to you that Mr. Guzman may not be the most truthful man who ever set foot in this courthouse. But obviously this is something that has to be called to your attention because the whole government's case rests on Mr. Guzman and since you are entitled to disregard his whole testimony, if you find he's testified falsely about any material fact, his whole testimony goes out the window.

In addition, as I said earlier, even if you believe Mr. Guzman's testimony, there isn't any case, I just suggest you may find; shouldn't credit his testimony, because what you have here I submit are recent fabrications by an over-zealous police officer anxious to succeed. Unfortunately but true, there are good policemen and bad policemen, there are good doctors and bad doctors, there are good carpenters, bad carpenters. Guzman went up there to Spanish Harlem and conceded that he failed in his attempt to make a narcotics transaction. However, that didn't stop him. He is sort of like the traffic cop who's got to get his quota of tickets and Mr. Torres was part of his quota.

You know, ladies and gentlemen, in this Court, I believe Judge Wyatt will charge you on this, that anything I say which in any way contradicts what Judge Wyatt says, then I am wrong because he is the arbiter of the law and you take your law from him.

Both the government and defendant stand as equals before the bar of justice; and a witness is entitled to no greater credit or no greater consideration by you just because the government calls him rather than the defendant. In other words, a witness is to be treated the same no matter who calls him. Nobody gets a halo around his head because Mr. Cutner calls him. Judge Wyatt will charge you that.

Imagine if we, the defense, who has no obligation to produce any evidence, defense that has no obligation to produce anything, can sit back and rest on this meager, skimpy garbage that the government produced in this case, imagine if we called a witness like Guzman with his past record of unreliability, with his past record of inconsistent testimony, with his past record of falsity; and he was called on behalf of Mr. Torres. You wouldn't hesitate not to believe him in a second. Well, Mr. Guzman does not become any better as a witness just because Mr. Cutner puts him on the stand. Indeed, in many ways, he becomes harder to believe, because the government has the burden of proof in this case (Tr. 157-166).

GOVERNMENT'S REBUTTAL SUMMATION

Much is made about these inconsistencies and again I suggest to you that you consider the context in which they occurred.

It's pointed out that the testimony was a little different in the Jesus Sanjurjo trial. What does Detective Guzman say in the Jesus Sanjurjo trial? He says, "When I parked on 100th Street and 1st Avenue, I was approached by Wilson Torres who then instructed me to drive to 120th Street and 1st Avenue. While I was driving, Lillian told me that the connection had to be careful that I wasn't being followed."

Okay, don't forget here that the focus is on Jesus Sanjurjo. That is what the trial is all about. Detective Guzman in trying to be as careful as he can, is giving testimony against Jesus Sanjurjo. He is not asked what was your conversation with Wilson Torres. In this case, in all the testimony, we tried to put the focus or the spotlight on Wilson Torres. He is the man on trial. We want to focus on what he did.

Mr. Naftalis: Your Honor, I object.

Mr. Cutner: Not what somebody else did.

Mr. Naftalis: He was asked in a prior trial and this was a matter which was before the Court before, to recount the events of that happening and I think this argument is not——

The Court: I cannot assess the weight of the evidence as between your contention and Mr. Cutner's. You have made your statement, the jury has heard.

Mr. Naftalis: Thank you, your Honor.

The Court: Mr. Cutner has made his. It's the recollection of the jury which controls. Let's go on.

Mr. Naftalis: Thank you.

Mr. Cutner: All right. I again, that is something I concede. Mr. Guzman was asked to recount the events of that evening and he did. He told them a little bit differently than he did a year ago; and he appeared before you on the witness stand and he testified a little bit differently than he did a year ago in this trial. I suggest to you again that that is just human nature. So what Mr. Naftalis has really done here is try to insert a kind of a bogus factor in this case. If you consider the agent's demeanor, his direct responses to questions, I think if you consider his motive here, I think if

you consider just the inherent sense of his testimony, the way it fits in with all the other proof in the case, that you just don't have a reason to take that testimony and throw it out the window. It just doesn't make sense to do that (Tr. 180-182).

Thus, when Guzman's re-direct testimony about the Jesus Sanjurjo trial is put in context with the rest of the testimony and argument, it is absolutely clear that the jury could not have been misled. Defense counsel pointed out the inconsistencies between Guzman's testimony at the two trials * on cross-examination and recross-examination, in the defense summation, and by objecting to the Government's rebuttal summation. Indeed, following this objection, the Assistant expressly conceded that, at the Jesus Sanjurjo trial, "Mr. Guzman was asked to recount the events of that evening and . . . he told them a little bit differently" (Tr. 181). Torres maintained that this and other inconsistencies proved Guzman's testimony was entirely perjured. We submit that, especially under these circumstances, it was proper for the Government to prove that Guzman had not been specifically asked about Torres at the Jesus Sanjurjo trial, and to argue that Guzman's memory, and hence his testimony, was fuller once he was required to focus on Torres. Indeed, on re-direct examination Guzman testified without objection to that effect.**

* While Torres attempts to make much of these alleged inconsistencies, Guzman's testimony at the Jesus Sanjurjo trial included an account, albeit a briefer one, of the conversation with Torres and Lillian Ortiz. Guzman's testimony at both trials is set forth in the footnote at page 11, *supra*.

** Guzman testified on re-direct as follows:

"Q. Mr. Naftalis asked you about whether your memory of these events on February 14, 1972, were better when you wrote your report or now, and your answer was to the effect yes and no. Can you tell us what you meant by that? A. Yes, sir. At the time that you write the report, sometimes is things that you forget about it, or you

[Footnote continued on following page]

Finally, Torres asserts that this redirect examination of Guzman flies in the face of this Court's opinion reversing the original conviction. Once again, Torres makes his point by selectively quoting from the opinion. He omits the Court's conclusion that "Thus the implication of Guzman's testimony that there were other conversations with Jesus Sanjurjo not testified to at the Torres trial was not wholly accurate. . . . The prior transcript would have established the inaccuracy of Guzman's testimony about the existence of other conversations with Jesus Sanjurjo. . . ." 503 F.2d at 1127. Thus, this Court's concern was with a question put by the Government at Torres' first trial, which was not put at the retrial. Torres' point is therefore totally without merit, particularly since the question Torres claims as reversible error was asked at the first trial and when discussed by this Court, 503 F.2d at 1127, was not suggested to have been improper.

just don't remember right then and there; and as time goes by and your mind goes back to that night, sometimes you may forget something that you have written on the report, and on the other hand you might also remember things that you don't have in the report.

Q. It's true too that your reports concern a number of individuals, is that correct? A. Yes, sir.

Q. All of which may or may not be indicted and brought to trial, isn't that correct? A. Yes, sir.

Q. So that you may be called upon to give testimony with respect to all of them or none of them or only one of them, isn't that also correct? A. That's correct, yes, sir.

Q. So that when you focus on one particular individual you may be called upon to remember additional details that weren't included in your report. A. That's true.

Q. Is that right? A. Yes, sir" (Tr. 70-71).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID A. CUTNER being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13TH day of JUNE, 1975
he served 2 copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

GARY P. NAFTALIS, ESQ
ONE ROCKEFELLER PLAZA
NEW YORK, N.Y. 10020

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Ward G. Cutler

Sworn to before me this

12th day of July, 1975
Jeanette Ann Harris

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977